

A Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–75
OF 2008(T)

B RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM
YUSOFF AND ABDULL HAMID EMBONG FCJJ
25 MARCH 2010

C *Criminal Law — Dangerous drugs — Trafficking — Agent provocateur —*
Whether evidence of agent provocateur should be subject to balancing exercise to
determine weight — Whether evidence of agent provocateur could be equated
with similar fact evidence or discovery information — Whether there was lack of
D *common intention to traffick in drugs — Dangerous Drugs Act 1952 ss 39B &*
40A

E On 12 April 1999, a police officer acting as an agent provocateur ('the agent
provocateur') was introduced to the appellant through informers.
Negotiations then took place between the agent provocateur, who posed as a
drugs purchaser, and the appellant for the sale and purchase of 1kg of ganja.
At 9pm on the same day the agent provocateur met up with the appellant and
the co-accused, one Pak Ya now deceased (the deceased), who was introduced
to the agent provocateur by the appellant. At that meeting the appellant
showed the agent provocateur a package containing the drugs but the agent
F provocateur refused to accept it on the pretext that he had to go to Kota
Bahru that night. Instead the agent provocateur entered into fresh
negotiations with the appellant and the deceased to purchase 2 or 3kg of
ganja at RM1,900 per kg. On 21 April 1999, the deceased called the agent
provocateur and they agreed on the delivery of the drugs at an appointed
G time. When the agent provocateur arrived at the delivery place he was
informed by the deceased that the drugs were in the car driven by the
appellant. After he had ascertained that the drugs were in the car, the agent
provocateur gave the pre-arranged signal to the police ambush party who had
taken position in the vicinity to move in. Both the appellant and the deceased
H were then arrested and an analysis of the drugs seized was confirmed to be
1884.16g of ganja. The appellant and the co-accused were thereafter charged
and convicted of trafficking in dangerous drugs under s 39B of the
Dangerous Drugs Act 1952 ('the Act'). On appeal the Court of Appeal
upheld the conviction. This was the appellant's appeal against that decision.
I In this appeal the appellant submitted that the trial judge ought to have
submitted the evidence of the agent provocateur to a balancing exercise to
determine its weight and that his failure to do so resulted in a misdirection.
It was thus the appellant's contention that evidence of entrapment was highly
prejudicial and that it was incumbent upon the trial court to do a balancing

exercise before acting on such prejudicial evidence. The appellant further submitted that he had only negotiated with the agent provocateur with regard to the sale and purchase of 1kg of ganja that was to take place on 12 April 1999 ('the first transaction') and which transaction was then aborted in the sense that there was no delivery of the ganja. The appellant also submitted that there were no negotiations between him and the agent provocateur as to the transaction leading up to the delivery of 1884.16g of ganja on 21 April 1999 ('the second transaction'), in which his role was only that of a mere driver of the car. The appellant thus contended that since the transactions were in two parts where the appellant played no active role in the second transaction, these two transactions could not be taken together to find that a common intention existed between the appellant and the deceased in committing this offence. As such the appellant submitted that the finding of the trial judge that the appellant participated in the trafficking of drugs was flawed.

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Held, dismissing the appeal:

- (1) Under the Malaysian law there was no defence of entrapment. In any event, it was for the appellant to prove that he committed this offence as a result of entrapment, which was a finding of fact, but as there was no such finding by the trial court the defence of entrapment as a defence did not arise. For the defence to operate at all the appellant had to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence. However, the facts showed that the appellant was an 'unwary criminal' who readily participated in the offence and thus there was no entrapment in the instant case (see paras 26–27).
- (2) The court would need to do the balancing exercise in weighing the probative value of similar fact evidence or discovery information in the interest of a fair trial, but it was a fallacy to equate the evidence of an agent provocateur with that of similar fact evidence or discovery information and therefore subject such evidence to a balancing exercise to determine its weight. Section 40A of the Act which governs the admissibility of an agent provocateur's evidence is silent on the need to subject such evidence to a balancing exercise. Thus the appellant's contention that the trial judge failed to subject the evidence to any balancing exercise could not be substantiated (see paras 28–33).
- (3) Although there was no negotiation between the appellant and the agent provocateur under the second transaction, taken together there was in fact only one transaction arising from a single negotiation for the sale of the drug in which the appellant actively participated. The trial court had made a finding of fact that there was only one transaction and this finding was affirmed by the Court of Appeal. Being only one

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- A transaction there was no flaw in the finding by the trial judge that both the appellant and the deceased had acted in coercion with a common intention to traffick in the drugs and the appellant's contention of lack of common intention was without merit (see paras 34–36).
- B **[Bahasa Malaysia summary]**
Pada 12 April 1999, seorang pegawai polis yang bertindak sebagai ejen perangkap ('ejen perangkap') telah diperkenalkan kepada perayu melalui pemberi maklumat. Rundingan berlaku antara ejen perangkap, yang berpura-pura bertindak sebagai pembeli dadah, dengan perayu bagi jual beli 1kg ganja. Pada pukul 9 malam hari yang sama, ejen perangkap telah berjumpa dengan perayu dan tertuduh bersama, Pak Ya yang telah meninggal dunia ('si mati'), telah diperkenalkan kepada ejen perangkap oleh perayu. Ketika perjumpaan itu, perayu menunjukkan kepada ejen perangkap satu bungkusan mengandungi dadah-dadah tersebut tetapi ejen perangkap enggan menerimanya atas dalihan bahawa dia perlu ke Kota Bahru pada malam itu. Sebaliknya, ejen perangkap memasuki satu rundingan baru dengan perayu dan si mati untuk membeli 2 atau 3kg ganja pada harga RM1,900 per kg. Pada 21 April 1999, si mati telah menelefon ejen perangkap dan mereka bersetuju bagi penghantaran dadah pada masa yang ditetapkan. Apabila ejen perangkap tiba di tempat penghantaran, dia diberitahu oleh si mati bahawa dadah-dadah tersebut berada di dalam kereta yang dipandu oleh perayu. Selepas memastikan bahawa dadah-dadah tersebut berada di dalam kereta, ejen perangkap memberi isyarat yang diatur terlebih dahulu kepada pasukan serang hendap polis yang telah mengambil posisi di dalam kawasan tersebut untuk masuk. Kedua-dua perayu dan si mati kemudiannya ditangkap dan satu analisis ke atas dadah-dadah yang dirampas disahkan sebagai 1884.16g ganja. Selepas itu, perayu dan tertuduh bersama-sama dituduh dan disabitkan atas pengedaran dadah berbahaya di bawah s39B Akta Dadah Berbahaya 1952 ('Akta'). Di peringkat rayuan, Mahkamah Rayuan mengesahkan sabitan. Ini adalah rayuan perayu terhadap keputusan tersebut. Di dalam rayuan ini, perayu menghujahkan bahawa hakim seharusnya mengemukakan keterangan ejen perangkap sebagai imbalan untuk menentukan kesannya dan kegagalan berbuat sedemikian menyebabkan salah arah. Adalah menjadi hujahan perayu bahawa bukti pemerangkapan adalah sangat memudaratkan dan adalah kewajipan mahkamah untuk menjalankan pertimbangan sebelum bertindak ke atas sesuatu bukti yang memudaratkan. Perayu menghujahkan lagi bahawa dia hanya berunding dengan ejen perangkap berkaitan jual beli 1kg ganja yang sepatutnya berlaku pada 12 April 1999 ('transaksi pertama') dan transaksi tersebut tidak berlaku di mana tidak terjadi penghantaran ganja. Perayu juga menghujahkan bahawa tiada rundingan antara dia dengan ejen perangkap mengenai transaksi yang membawa kepada penghantaran 1884.16g ganja pada 21 April 1999 ('transaksi kedua'), di mana beliau cuma berperanan sebagai pemandu kereta tersebut sahaja. Perayu kemudiannya berhujah bahawa memandangkan transaksi terbahagi kepada dua bahagian di
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mana perayu tidak memainkan peranan aktif di dalam transaksi kedua, kedua-dua transaksi tidak boleh digabungkan untuk melihat sama ada niat bersama wujud antara perayu dengan si mati di dalam melakukan kesalahan ini. Oleh itu, perayu berhujah bahawa keputusan hakim yang memutuskan perayu telah terlibat dalam pengedaran dadah adalah silap.

Diputuskan, menolak rayuan:

- (1) Di bawah undang-undang Malaysia, tiada pembelaan bagi pemerangkapan. Di dalam apa jua keadaan, perayu mesti membuktikan bahawa dia melakukan kesalahan ini hasil daripada pemerangkapan, iaitu satu keputusan fakta, tetapi memandangkan mahkamah tidak berpendapat sedemikian, pembelaan pemerangkapan sebagai pembelaan tidak timbul. Bagi membolehkan pembelaan ini, perayu perlu menunjukkan bahawa dia sebenarnya 'tidak berhati-hati dan tidak bersalah' yang tidak akan, jika tidak kerana pemerangkapan, melakukan kesalahan tersebut. Walau bagaimanapun, fakta-fakta menunjukkan bahawa perayu adalah 'penjenayah tidak berhati-hati' yang secara sukarelanya mengambil bahagian di dalam kesalahan dan oleh itu, tiada pemerangkapan dalam kes ini (lihat perenggan 26–27).
- (2) Mahkamah perlu menjalankan perimbangan dalam mempertimbangkan nilai probatif keterangan fakta yang sama atau penemuan maklumat bagi perbicaraan yang adil tetapi ia adalah satu salah anggapan untuk menyamakan keterangan ejen perangkapan dengan keterangan fakta yang sama atau penzahiran maklumat dan oleh itu membuat imbangan keterangan tersebut untuk menentukan kesannya. Seksyen 40A Akta yang mengawal kebolehterimaan bukti seorang ejen perangkap tidak memperuntukkan bahawa bukti tersebut perlu diimbangi. Oleh itu, hujahan perayu bahawa hakim gagal untuk membuat imbangan keterangan tidak boleh disahkan (lihat perenggan 28–33).
- (3) Walaupun tiada rundingan antara perayu dan ejen perangkap ketika transaksi kedua, dilihat secara bersama, terdapat hanya satu transaksi sahaja daripada satu rundingan untuk jualan dadah di mana perayu terlibat secara aktif. Mahkamah memutuskan bahawa fakta menunjukkan hanya terdapat satu sahaja transaksi dan ini disahkan oleh Mahkamah Rayuan. Oleh kerana hanya satu sahaja transaksi, tiada kecacatan dalam keputusan oleh hakim bahawa kedua-dua perayu dan si mati telah bertindak secara paksaan dengan niat bersama untuk mengedar dadah-dadah tersebut dan hujahan perayu bahawa tiada niat bersama adalah tidak bermerit (lihat perenggan 34–36).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

A Cases referred to

Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2004] 6 AMR 810, CA (refd)

Emperor v Chaturbhuj Sahu ILR 38 Cal 96 (refd)

Goi Ching Ang v PP [1999] 1 MLJ 507, FC (folld)

B *Goh Lai Wak v PP* [1994] 1 SLR 748, CA (refd)

Jacobson v US (1992) 503 US 540, SC (refd)

Mathews v US (1998) 485 US 58, SC (refd)

PP v Han Kong Juan & Ors [1983] CLJ Rep 773, HC (refd)

R v Latif; R v Shahzad [1996] 1 WLR 104, HL (refd)

C *R v Loosely* [2001] UKHL 53, HL (refd)

R v Mortimer (1911) 80 LJ KB (refd)

R v Sang [1980] AC 402, HL (refd)

R v Smurthwaite; R v Gill [1994] 1 All ER 898, CA (refd)

Rex v Mullins (1948) 3 Cox Cr Cases 526 (refd)

D *Teja Singh & Mohamed Nasir v PP* [1950] MLJ 71, HC (refd)**Legislation referred to**

Dangerous Drugs Act 1952 ss 39B, 40A, A(1), (2)

Evidence Act 1950 ss 14, 15, 27

E Police and Criminal Evidence Act 1984 [UK] s 78

Appeal from: Criminal Trial No T-05–23 of 2003 (B) (Court of Appeal, Putrajaya)

F *Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.*
*Ahmad Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.***Abdull Hamid Embong FCJ (delivering judgment of the court):****G**

[1] The appellant and a co-accused (one Pak Ya, now deceased) were convicted for a trafficking of drugs charge under s 39B of the Dangerous Drugs Act 1952 ('the Act'). On appeal, the Court of Appeal upheld the conviction. Briefly, the facts relevant to this appeal are as follows.

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[2] One Police Det Kpl Mahmood bin Nor ('SP3') acted as an agent provocateur and posed as a drugs purchaser. SP3 was introduced by another police personnel to an informer who in turn introduced him to a second informer. The second informer introduced SP3 to the appellant on 12 April 1999.

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[3] In their discussion, at a restaurant in Jerteh, SP3 informed the appellant that he wanted to purchase 1kg of ganja. The appellant agreed to supply SP3 the drugs the same day at 9.30pm, at the same restaurant where they held their negotiation. That night at the appointed time and place SP3 met up with the appellant and Pak Ya was introduced to him by the appellant. After some discussion, Pak Ya told SP3 that the drugs were in the car. However the appellant and Pak Ya dare not transact the sale of the drugs at the restaurant and asked SP3 to follow them to another place. After following the appellant and Pak Ya for some 3km, the appellant stopped the car he was driving. The appellant then showed to SP3 a packaging containing the drugs. SP3 however refused to accept it stating that he had to go to Kota Bharu that night. SP3 instead told the appellant that he now wished to purchase 2 or 3kg of ganja at RM1900 per kg.

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[4] On 20 April 1999, Pak Ya called SP3 on the latter's handphone and told SP3 that 2kg of ganja were available. The next day, Pak Ya again called SP3 and they agreed on the delivery of the drugs. SP3 informed his superior of this and a trap was set for the appellant and Pak Ya. At 1.25pm that day, the appellant and Pak Ya arrived at the appointed delivery place ie at the Esso petrol kiosk in Kemaman. SP3, who was tailing the car driven by the appellant, stopped behind that car. Pak Ya alighted from the car he was riding and approached SP3. SP3 was told that the drugs were in the car driven by the appellant. SP3 then went over to the car and opened its back door to inspect the drugs. He could smell the odour of ganja as he opened the door. SP3 then walked back to his car. As he did so he gave the pre arranged signal to the police ambush team who had taken position in the vicinity. The police team immediately acted to pounce on the appellant and Pak Ya. Both of them were seen to be pale and shaking with fear upon being accosted by the police. Both were promptly arrested and the drugs seized.

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[5] Scientific analysis confirmed the drugs to be ganja, weighing 1884.16g, now the subject of the charge faced by the appellant.

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[6] Learned counsel of the appellant raised two arguments in this appeal. These two issues he said were not raised before, either at the trial stage or the intermediate appellate stage. He however stated that as these are points of law they may still be considered by the apex court. We allowed him to argue those points. We now address those points.

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WHETHER THE TRIAL JUDGE SHOULD SUBJECT THE EVIDENCE OF SP3, THE AGENT PROVOCATEUR, TO A BALANCING EXERCISE TO DETERMINE ITS WEIGHT

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[7] Admissibility of the evidence of an agent provocateur is not in issue. Neither is his credibility as a witness. Statute has provided for this in the form of s 40A of the Act which states:

- A** 40A(1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
- B**
- C** (2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

AGENT PROVOCATEUR

- D** [8] The use of agent provocateurs, or undercover or police spies is now a common method utilised by the police in flushing out and ultimately apprehending drugs traffickers. It must be remembered that such covert activities of these drug traffickers are carried out with a high degree of secrecy that, without using this technique of surveillance and investigation, it may be impossible for anti-drugs law enforcers to penetrate into this nefarious underworld activity and identify who are the perpetrators. Lord Alverstone CJ in *R v Mortimer* (1911) 80 LJ KB at p 77, commenting on evidence adduced by one who himself participated in committing the offence made this observation:
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- F** I do not like the police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in consequence of the trap are none the less unlawful.
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- H** [9] In a typical police undercover operation scenario (as happened in this case) the police would receive information from its informer of a drug trafficking activity. An agent provocateur, normally himself a police officer, will then be assigned to undertake what is called a 'sting operation'. The agent provocateur will get in touch with the informer. The informer will then arrange for an introduction and meeting between the agent provocateur, (who will play the role of a drug-buyer) and the drug trafficker. The informer will take no further active role and normally disappear. Negotiations will then take place between the agent provocateur and the drug trafficker where the amount of drugs to be supplied, its price and place of delivery will be discussed and agreed upon. The agent provocateur himself thus takes an active role in the commission of the offence. Both parties become willing participants in that offence. This is what is meant by the phrase 'to abet the commission of the offence' as found in s 40A(1) of the Act. The agent
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provocateur's role is to uncover the offence and gather evidence to be later given at the trial against the trafficker. This, as discussed later in this judgment, is however not an entrapment that gives rise to a legitimate defence.

[10] An agent provocateur may thus be defined as one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested. In the *Dictionary of Law* by LB Curzon, he is defined as a person:

who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.

[11] The evidence of an agent provocateur is however not that of an accomplice's and as such requires no corroboration (see *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71; also *Goh Lai Wak v Public Prosecutor* [1994] 1 SLR 748). In that case, Spencer Wilkinson J makes the following distinction between an agent provocateur and an accomplice by making reference to this passage from *Emperor v Chaturbhuj Sahu* ILR 38 Cal 96:

A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

Another passage was also quoted from Maule J's judgment in *Rex v Mullins* (1948) 3 Cox Cr Cases 526, to draw this distinction and to hold that corroboration is unnecessary. Maule J said this:

The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration.

[12] As for the creditworthiness of an agent provocateur as a witness Spencer Wilkinson J in *Teja Singh* made the following remarks:

- A It appears from the extract above quoted that the learned author of *Roscoe's Criminal Evidence* classed agents provocateur in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him.
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- [13] This observation of the creditworthiness of an agent provocateur is now enshrined in s 40A(1) of the Act which now provides that presumption on creditworthiness.
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- [14] This presumption of being a creditworthy witness is of course rebuttable. It falls upon the defence then to adduce sufficient evidence for the court to conclude that the evidence of an agent provocateur is unworthy of credit (see *Public Prosecutor v Han Kong Juan & Ors* [1983] CLJ Rep 773).
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- [15] Under s 40A of the Act, the evidence of the agent provocateur cannot be excluded in the exercise of judicial discretion (see *Evidence Practice and Procedure* (3rd Ed) by Augustine Paul). An otherwise admissible evidence such as this one under s 40A of the Act does not become inadmissible merely because it had been improperly or unfairly obtained. Section 40A(2) of the Act affirms this admission notwithstanding any other laws, written or otherwise, to the contrary. He may thus relate the full story of what happened in his negotiations with the drugs seller and any statements made by the latter to him shall be admissible in evidence.
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- In *R v Smurthwaite; R v Gill* [1994] 1 All ER 898, the English Court of Appeal (Criminal Division) in dismissing the appeals of two persons convicted of soliciting to murder founded on the evidence of an undercover police officer held as follows:
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- A judge had no discretion to exclude otherwise admissible evidence merely on the ground that it had been obtained improperly or unfairly and the evidential requirement in s 78 of the 1984 Act that prosecution evidence might be excluded having regard to the circumstances in which it was obtained had not altered the substantive rule of law that entrapment or the use of an agent provocateur did not per se afford a defence in law to a criminal charge. However, if the judge considered that in all the circumstances the obtaining of the evidence in that way would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, he could exclude it. Accordingly, it was not open to the appellants to claim that had it not been for the undercover officers acting as agent provocateurs they would not have solicited the murder of their spouses and on the facts the tape recordings were in each case an accurate and unchallenged record of the actual offence being committed. They had accordingly been properly admitted in evidence.
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[16] Also the propriety of obtaining the evidence with the use of an agent provocateur would not impair the fairness of the trial itself as this passage from Lord Diplock's judgment in *R v Sang* [1980] AC 402 suggests. His Lordship said:

For the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for the reasons.

[17] And Lord Salmon, in the same case stated the same proposition in a more forceful manner when he said:

A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he was persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt — for this would amount to giving the judge the power of changing or disregarding the law. It would moreover be seriously detrimental to public safety and to law and order, if in such circumstances, the law immunised an accused from conviction.

[18] Reverting to the main thrust of his submission, learned counsel stated that this issue is raised against the peculiar background facts of this case in that:

- (a) the appellant negotiated with SP3 only on 12 April 1999 ('the first transaction'). The first transaction was then aborted in the sense there was no delivery of the cannabis;
- (b) that in the transactions on 20 April 1999 and 21 April 1999 ('the second transaction') there was absolutely no negotiations between the appellant and SP3. It was the second accused (Ibrahim Nawang — now deceased ie Pak Ya) who called SP3 as he had 2kg of cannabis.

On the next day, that is, on 21 April 1999 the second accused again called SP3 to conclude the delivery. At about 1pm the second accused again asked SP3 saying that he would be late. At the scene (Esso petrol kiosk) it was the second accused who took the necessary steps to deliver the cannabis up to the point of SP3 giving the prearranged signal. The appellant's role on 21 April 1999 was that he was a mere driver of the car.

The learned trial judge relied on the first transaction to find possession (p 1229 of the appeal record) and thereafter from possession to trafficking by relying on s 2 of the Act.

- A [19] It was submitted that an entrapment by SP3 had occurred. Learned counsel stated that since such evidence of entrapment is highly prejudicial, it is incumbent upon the trial court to do a 'balancing exercise' before it can act on that prejudicial evidence. The balancing exercise requires the trial court to determine whether the prejudicial effect of the entrapment evidence outweighs its probative value. If the answer is in the affirmative then the trial court cannot act on it because it offends the principles of fairness. A misdirection had thus occurred in the trial.
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ENTRAPMENT

- C [20] The landmark decision of the US Supreme Court in *Jacobson v US* (1992) 503 US 540 (a prosecution for receiving child pornographic materials via the mail), which recognised entrapment as an affirmative defence in the Federal Courts, defined entrapment as:
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... when the government *originate* a criminal design, *implant* in an innocent person's mind the disposition to commit a criminal act, then *induces* the commission of that crime so that the government may prosecute.

- E The underlined words emphasise the crucial features for this defence to operate.

This 5–4 majority decision of the US Supreme Court has been described by some academic critique as bringing the entrapment defence 'back from the (almost) dead'. In that case it was held that inducement is a threshold issue.

- F Mere solicitation to commit an offence is not an inducement. Thus if the accused person promptly accepts an agent provocateur's offer of an opportunity to buy or sell drugs, this itself may establish the accused's predisposition (*Jacobson's* case). He is thus, not induced.

- G [21] It is for the defence to prove that an inducement had occurred. This element is proven if the accused can show that:

(a) he is unduly persuaded, threatened, coerced, harassed or offered friendship or sympathy by the police/government agent, and

- H (b) the government agent's conduct created a situation that an otherwise a law abiding person would commit an offence.

To determine entrapment a line thus needs to be drawn between trapping an 'unwary innocent' and 'an unwary criminal'. An unwary criminal who readily avails himself of an opportunity to commit an offence, betrays his criminal predisposition. He would thus not be able to take advantage of this defence (see *Mathews v US* (1998) 485 US 58, SC).

- I In *R v Loosely* [2001] UKHL 53, the House of Lords describes this situation in this manner:

If the defendant already had the intent to commit a crime of the same or similar kind, then the police did no more than give him the opportunity to fulfill his existing intent.

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[22] In England, entrapment is not a substantive defence (*R v Sang*). Learned counsel for the appellant in citing *Loosely*, urged this court to adopt the position taken by the House of Lords, in that case on the question of entrapment. That case considered the admissibility of entrapment evidence in the context of the English position.

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[23] Section 78 of the English Police and Criminal Evidence Act 1984, empowers the court to exclude any evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings. In *R v Smurthwaite* [1994] 1 All ER 898, Lord Taylor of Gosforth CJ stated that 's 78 has not altered that substantive rule that entrapment itself does not provide a defence'. Thus the evidence obtained by entrapment need not necessarily be excluded by the court.

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[24] The House of Lords in *Loosely* however held that the court may grant a stay of proceedings (which has the same beneficial effect as an acquittal) as an appropriate response in the case of entrapment, on the ground that a 'prosecution founded on entrapment would be an abuse of the court's process' (see the judgment of Lord Nicholls of Birkenhead).

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[25] The development of remedies to entrapment under English law, both statutory and common law, now allows the court to either exclude evidence pursuant to s 78 of the Police and Criminal Evidence Act 1984, or to grant a stay which the House of Lords in *Loosely* said is a preferred remedy. This judicial response it seems is based on the need to uphold the rule of law. 'A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly' (per Lord Nicholls of Birkenhead). To prosecute in such circumstances would be an 'affront to public conscience' (Lord Steyn in *R v Latif*; *R v Shahzad* [1996] 1 WLR 104). The remedy is thus recognised to protect the integrity of the criminal justice system.

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[26] Back home, our Evidence Act, does not provide for any exclusionary provision similar to that as in s 78 of the English Police and Criminal Evidence Act 1984. In our view, the common law position that entrapment is not a substantive defence remains the law. The position taken by the High Court in *Han Kong Juan* where it was pronounced that there is no place in Malaysian law to allow the so called defence of entrapment, is still good law here.

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- A [27] In any event, it is for the appellant to prove that he committed this offence as a result of an entrapment. This can only be determined from the facts to be evaluated by the trial court. In other words it is a question of fact. As there was no finding of facts on this issue by the trial court the issue of entrapment as a defence does not arise in this case. On this point alone, it
- B demolishes the first argument raised by learned counsel for the appellant. For the defence to operate at all, the appellant needed to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed this offence. The facts however show that the appellant was a person with an opposite disposition; ie that of an 'unwary criminal' who
- C readily participated in this offence. In this case, at worst, SP3's action can only be described as soliciting the appellant to supply the drugs. There was no entrapment as such.

D SIMILAR FACTS EVIDENCE, DISCOVERY AND THE AGENT
PROVOCATEUR'S EVIDENCE

- E [28] Learned counsel likened the evidence of the agent provocateur to that of similar fact evidence under s 14 and s 15 of the Evidence Act 1950 and information leading to discovery under s 27 of the Evidence Act 1950. He cited the case of *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810 in support for the proposition that a balancing exercise in weighing the probative value of similar fact evidence against its prejudicial effect is required before the court can admit similar fact evidence.
- F [29] *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 was cited as authority not to admit prejudicial evidence which is of a trifling weight and by its admission would operate unfairly against the accused person.
- G [30] Let us quickly say that it is a fallacy to equate the evidence of an agent provocateur on equal footing with that of similar fact evidence or discovery information. We agree that under the two latter circumstances the court will need to do the balancing exercise on the evidence in the interest of a fair trial. However unlike the evidence under those two circumstances, the evidence of
- H an agent provocateur is actually direct evidence on the commission of an offence. The purpose of adducing similar fact evidence and discovery information is also different. The former (under s 14 of the Evidence Act) is to prove the existence of a state of mind of the accused, and the latter (under s 27) to prove the veracity of the information received from the accused. The
- I existence of the facts as a basis of that proof thus needs to be enquired into by the trial court to determine if anything said by the accused, although probative and relevant, is too prejudicial to be admitted as evidence.

[31] In the case of an agent provocateur's evidence however, the statutory approval for the admission of such evidence as governed by s 40A of the Act, is indisputable. The need for admission of an agent provocateur's evidence has been alluded to earlier in this judgment. The special provision as found in s 40A of the Act is provided to address this very need. The law too is silent on the need to subject such evidence to a balancing exercise.

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[32] Learned counsel of the appellant urged this court to apply the balancing exercise requirement in the interest of fairness. But the principle of fairness cuts both ways. In the fight against the drug menace, Parliament has deemed it fit that such evidence of an agent provocateur be admissible without any restrictions. The trial judge is no longer vested with a discretion to exclude such evidence. The court is only to interpret legislations and not to add new elements especially when the words in statutes are clear and unambiguous.

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[33] There is thus no further need to subject that evidence to any balancing exercise as proposed by learned counsel in his submission. The contention that this omission is a misdirection by learned trial judge therefore cannot be substantiated.

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[34] In this appeal, there had been a concurrent findings of facts by both the trial court and the Court of Appeal in regard to the appellant being in direct possession of the drugs upon his arrest. That finding cannot now be disturbed. It was also the findings of both courts below that the so called 'second transaction' was part of and form a continuation of the 'first transaction' for the sale and purchase of the drugs in which the appellant took an active part. Although there was no negotiation between the appellant and SP3 under the 'second transaction', in our view this does not mean that the appellant was not involved in the trafficking of those drugs. Negotiations were completed by the appellant and SP3 during the 'first transaction' although delivery of the drugs took place nine days later. It is therefore not wrong for the learned trial judge to also consider the 'first transaction' and found that the appellant participated in the trafficking of the drugs. Taken together, there was in fact only one transaction, arising from a single negotiation for the sale of the drug, in which the appellant actively participated.

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COMMON INTENTION

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[35] The second argument raised was that since the transactions were in two parts where the appellant played no active role in the 'second transaction', these cannot be taken together to find that a common intention existed between the appellant and Pak Ya in committing this offence. The trial court

- A had made a finding of fact that there was only one transaction. This finding was affirmed by the Court of Appeal. Being only one transaction common intention applied as found by the trial court as a fact. Having reviewed the facts and the reasons given by the trial judge in concluding that the commission of this offence was done with a common intention, it is our
- B finding that this contention of lack of common intention is without merit. We are satisfied that the learned trial judge had fully and properly evaluated the evidence in making the conclusion that he did. We are compelled to accept those findings.
- C [36] We can find no flaw in the finding made by the learned trial judge on this issue. Based on the facts the judge concluded that both the appellant and Pak Ya had acted in coercion, with a common intention to traffick in the drugs. This is not a legal issue. As earlier said, we find no error in the learned judge's approach in taking both transactions as a single act where both the
- D appellant and Pak Ya had formed a common intention to commit this offence. The learned judge made his finding in this passage, which we now affirm:
- E Dalam kes semasa, daripada keterangan persekitaran, terdapat keterangan yang boleh dipercayai bahawa OKT pertama dan OKT kedua telah bertindak bersepadu dalam melakukan kesalahan pengedaran dengan membawa cannabis untuk diserahkan dan dijual kepada SP3. Keterangan-keterangan itu adalah seperti berikut:
- F (a) OKT pertama dan OKT kedua telah terlibat dalam rundingan awal jual beli dadah dengan SP3 pada 12 April 1999 semasa dalam sebuah restoran.
- F (b) SP3 telah memesan 2–3kg cannabis dengan OKT pertama. OKT kedua telah membuat tawaran dengan menghubungi SP3 mengatakan dia mempunyai 2kg cannabis dan bersetuju untuk menyerahkan cannabis di Kemaman.
- G (c) OKT pertama dan OKT kedua bersama-sama membawa cannabis seperti dijanjikan ke Kemaman untuk diserahkan dan dijual kepada SP3.
- Mengenai pemakaian prinsip niat bersama, Kang Hwee Gee H dalam kes *Public Prosecutor v Krishna Rao all Gurumurthi & Ors* [2000] 1 MLJ 274 di ms 308, telah memetik perenggan 289 *Mallal's Current Law* yang berkata:
- H (ii) All that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed.
- I Jadi, menggunakan prinsip tersebut kepada fakta kes sekarang, jelas bahawa, walaupun peranan yang telah dimainkan oleh OKT pertama berbeza dengan tindakan yang telah diambil oleh OKT kedua, namun tindakan mereka berdua adalah sama, iaitu untuk melakukan satu kesalahan pengedaran dadah cannabis yang mereka telah lakukan.

[37] For these reasons, we dismiss this appeal and affirm the conviction and sentence.

Appeal dismissed.

Reported by Kohila Nesan

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